

IN THE
United States Court of Appeals
FOR THE FOURTH CIRCUIT

JAMES RIVER EQUIPMENT, VIRGINIA, LLC,
a Virginia Limited Liability Company,
Plaintiff-Appellee,

v.

JUSTICE ENERGY COMPANY INC.,
a West Virginia Corporation,
Defendant-Appellant.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF WEST VIRGINIA AT BECKLEY**

**CORRECTED BRIEF
OF DEFENDANT-
APPELLANT**

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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2. Does party/amicus have any parent corporations? YES NO
If yes, identify all parent corporations, including all generations of parent corporations:
3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? YES NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? YES NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) YES NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? YES NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: _____

Date: _____

Counsel for: _____

CERTIFICATE OF SERVICE

I certify that on _____ the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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I. JURISDICTIONAL STATEMENT

Jurisdiction is proper before this Court pursuant to 28 U.S.C. § 1291, which provides, in pertinent part:

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States. . . .

28 U.S.C. § 1291. This appeal arises from a Final Order (hereinafter “January 2016 Sanction Order”) issued by the District Court on January 5, 2016, holding Appellant, Justice Energy Company, Inc., in contempt and a February 25, 2016, Order (hereinafter “February 2016 Sanction Order”) issuing sanctions against Justice Energy Company, Inc. in favor of the United States in the amount of One Million, Two Hundred Thirty Thousand Dollars (\$1,230,000.00). Subsequently, Justice Energy Company, Inc. filed a timely *Motion to Alter or Amend the Sanction Judgment* (hereinafter “*Motion to Alter or Amend*”) pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. On August 4, 2016, the District Court issued a Memorandum Opinion and Order denying the *Motion to Alter or Amend the Sanction Judgment*. After an interlocutory appeal on the question of whether or not the sanctions in question were criminal in nature, the District Court entered a final Order of Dismissal on January 29, 2018. This appeal is taken from the February 2016 Sanction Order, the Memorandum Opinion and Order dated August 4, 2016,

and the Order of Dismissal entered on January 29, 2018. The appeal was timely filed on February 28, 2018.

II. ISSUES PRESENTED FOR REVIEW

- 1.) Whether or not the District Court abused its discretion by issuing civil sanctions against Appellant, Justice Energy Company, Inc., in the amount of One Million, Two Hundred Thirty Thousand Dollars (\$1,230,000.00), an amount so disproportionate to the offending conduct as to render the sanctions excessive?
- 2.) Whether or not the District Court abused its discretion by failing to give the proper weight to supplemental facts raised by Justice Energy Company, Inc. in its *Motion to Alter or Amend*, thus resulting in manifest injustice?

III. STATEMENT OF THE CASE

From the outset, it must be noted that Plaintiff James River Equipment, Virginia, LLC (Plaintiff below; hereinafter “James River”) and Justice Energy Company, Inc. (Defendant below; hereinafter “Justice Energy”) settled the underlying dispute and that the District Court’s One Million, Two Hundred Thirty Thousand Dollars (\$1,230,000.00) sanction judgment is the only issue before this Court. Significantly, the sanction is payable to the United States, not James River. Further, the sanction is more than eight (8) times the amount in controversy between

the parties. It is from the District Court's sanction order and denial of its Rule 59(e) motion that Justice Energy now appeals.

This civil action arose from James River's efforts to collect an outstanding debt of \$148,496.14 from Justice Energy. [JA 11-14]. James River initiated the underlying civil action with the filing of a *Complaint* in the United States District Court for the Southern District of West Virginia ("District Court") on November 6, 2013. [JA 11-14]. At that time, Justice Energy was owned and operated by Mechel Bluestone, Inc. ("Mechel Bluestone"), a wholly owned subsidiary of Mechel OAO, a Russian Company. [JA 535 at ¶ 2]. Roman Semenov served as general counsel of Mechel Bluestone and its subsidiaries. [JA 536 at ¶ 4]. As set forth below, the vast majority of events giving rise to the January 2016 Sanction Order and the February 2016 Sanction Order occurred while Justice Energy was owned and operated by Mechel Bluestone. Bluestone Industries, Inc. assumed operation and control of Justice Energy in February, 2015, and retained Roman Semenov as general counsel for Justice Energy to assist with the transition. [JA 535-536 at ¶¶ 2, 8]. In addition, Mr. Semenov continued to serve as the registered agent for service of process on behalf of Justice Energy. [JA 536 at ¶ 10]. However, Mr. Semenov failed to advise the officers and directors of Justice Energy of key rulings in this

matter. [JA 531 – 538]. Ultimately, this failure resulted in a \$1,230,000.00 sanction judgment against Justice Energy.

A. Events Culminating in the January, 2016, and February, 2016, Sanction Orders

In its Complaint, James River asserted claims of breach of contract and unjust enrichment against Justice Energy and sought damages totaling \$148,496.14, plus interest, costs, and attorneys' fees. [JA 13 at ¶ 13; JA 14 at ¶ 17]. When Justice Energy failed to answer the *Complaint*, James River filed a *Motion for Default Judgment*. [JA 29-90]. On January 6, 2014, the Court entered an *Order* directing the Clerk of the Court to enter a default pursuant to Federal Rule of Civil Procedure 55(a) and to send certified copies of the *Order* "to counsel of record and to the Defendant." [JA 91-92; JA 93]. The clerk attempted to forward the *Order* to Justice Energy at 100 Cranberry Creek Drive, Beckley, West Virginia *via* certified mail, but the return receipt indicated that the *Order* was returned to sender and marked "No Such Number Unable to Forward." [JA 94 and 98]. Thereafter, on January 21, 2014, the Court granted James River's motion for default judgment, and awarded James River \$156,112.16 in damages. [JA 102-103].

James River pursued a number of avenues to collect the judgment including securing the appointment of Magistrate Judge R. Clarke VanDervort as a commissioner to aid in execution of the judgment, [JA 118-119], and a debtor's examination on October 14, 2014. [JA 140]. James River issued a subpoena *duces*

tecum to Justice Energy on October 9, 2014, and had it personally served upon Roman Semenov. [JA 141-150]. The debtor's examination was held as scheduled on October 14, 2014, [JA 151] and Vladislav Andreev, Vice-President of Finance for Justice Energy (then owned and operated by Mechel Bluestone), appeared at the hearing. [JA 154:2-10].

Thereafter, in February of 2015, Bluestone Industries, Inc. ("Bluestone Industries") assumed operation and control of Justice Energy. [JA 535 at ¶ 2]. Mr. Semenov was retained as General Counsel of Bluestone Industries to assist with the transition. [JA 536 at ¶ 8]. Specifically, Mr. Semenov was retained to assist with a number of outstanding legal issues Bluestone Industries inherited from Mechel Bluestone, including approximately \$2,686,303.83 in unpaid vendor claims (thirty-two (32) of which involved ongoing litigation) and over \$1,000,000.00 in unpaid taxes. [*Id.* at ¶ 9]. In addition, Mr. Semenov continued to serve as the registered agent for service of process on behalf of Justice Energy. [*Id.* at ¶ 10]. Mr. Semenov requested and was permitted to work out of Washington, D.C. [*Id.* at ¶ 11].

In the Spring of 2015, Bluestone Industries closed the office at 100 Cranberry Creek Drive, Beckley, West Virginia and began a two-phase consolidation of offices to move their corporate offices to 216 Lake Drive, Daniels, West Virginia. [*Id.* at ¶ 12]. However, Mr. Semenov did ***not*** update the company's address with the West

Virginia Secretary of State as the registered agent for service of process. [*Id.* at ¶ 13].

On March 12, 2015, Magistrate Judge VanDervort issued an *Order* scheduling a Hearing on March 31, 2015, to address the current status of the judgment. [JA 196]. The Order indicated that attendance at the Hearing was mandatory for all parties and instructed the Clerk to send a copy of the Order to Roman Semenov, designated in the Office of the West Virginia Secretary of State as Justice Energy's agent for service of process. [*Id.*] As was the case with the debtor's examination, James River also issued a subpoena *duces tecum* to Justice Energy; however, it was not personally served on Roman Semov, but rather was mailed to him at the 100 Cranberry Creek Drive address. [JA 198]. Justice Energy did not appear at the Hearing. [JA 205:13-17].

Later that day, counsel for James River wrote to Roman Semenov as directed by Magistrate Judge VanDervort and advised him that the Court viewed Justice Energy's failure to appear at the March 31, 2015, Hearing as contemptuous. [JA 220]. Roman Semenov responded and advised that he "work[s] from Washington, D.C. and don't (sic) come to Beckley's (sic) office very often." [JA 223]. Mr. Semenov also requested a copy of the order granting default judgment which Mr. Hammond provided. [*Id.*].

On April 15, 2015, James River filed a *Motion to Compel and Motion for Contempt*. [JA 213-223]. The motion was referred to Magistrate Judge VanDervort and he issued an *Order* directing a Hearing be held on May 5, 2015. [JA 234]. Justice Energy failed to appear for the Hearing. [JA 241]. On May 11, 2015, Magistrate Judge VanDervort issued his *Proposed Findings and Recommendations* (hereinafter “PF&R”) wherein he recommended that Justice Energy and Mr. Semenov be found in contempt of Court and be required to pay James River’s counsel for his services in preparation for and attendance at the various hearings held on the judgment. [JA 255-261]. On the same day, the District Court issued an *Order to Show Cause*, commanding Justice Energy and Mr. Semenov to appear before the Court on May 20, 2015, to show cause why they should not be adjudged in contempt based on the facts contained in Magistrate Judge VanDervort’s PF&R. [JA 253-254].

On May 22, 2015, the District Court entered an Order directing Justice Energy to produce to James River any and all documents reflecting the assumption of debt and liability, if any, from a recent transaction with Mechel North America, Mechel Bluestone, Inc. and/or Mechel North America Sales Corporation within fourteen days of the entry of the Order. [JA 316-317]. The District Court determined that Justice Energy was “in contempt for failing to appear and violating the Court’s orders”. [JA 317]. As a contempt sanction, the Court granted James River judgment

for its fees, costs, and expenses as of May 20, 2015, in the amount of Four Thousand, Five Hundred Twenty-Seven Dollars and Forty-Five Cents (\$4,527.45) with leave to update the amount of fees, costs, and expenses. [*Id.*]

James River then filed a *Second Motion for Contempt and Motion for Sanction or Imprisonment of Officers and Directors until Justice Energy Complies with Court Order* (“Second Motion for Contempt”) on September 30, 2015, complaining that James River had not complied with the prior Order by providing the requested documents regarding whether or not Justice Energy had become responsible for the debts incurred by Mechel Bluestone. [JA 320-322; JA 323-336].

Thereafter, the parties entered into a settlement agreement on October 15, 2015, in which Justice Energy agreed to tender \$180,000 in six monthly payments of \$30,000 in full satisfaction of the underlying debt and the Court’s judgment of May 20, 2015, of \$4,527.45. [JA 543-544]. At that time, James River’s counsel verbally informed Magistrate Judge VanDervort of the settlement. [JA 544]. Magistrate VanDervort suggested that the parties file a joint motion permitting James River to withdraw the *Second Motion for Contempt*, approving the settlement agreement, and staying the action. [*Id.*]. Justice Energy tendered two \$30,000 payments to Plaintiff – the first in November and the second in December. [JA 520-521].

James River's counsel drafted the joint motion and forwarded it to Mr. Semenov; however, Mr. Semenov did not forward it to the officers and directors of Justice Energy and thus did not secure the signature of an authorized agent for Justice Energy. [JA 508; JA 532 at ¶ 11; JA 534 at ¶ 11; JA 537 at ¶ 23]. As a consequence, the joint motion was not filed until February 15, 2016, only *after* the management of Justice Energy received an e-mail from David Gutman of the Charleston Gazette requesting comment on the January 2016 Sanction Order (the "Gutman E-Mail"). [JA 509-511; JA 531-539]. Had the joint motion been filed and the *Second Motion for Contempt* withdrawn in October when the settlement agreement was effectuated, the January 2016 Sanction Order would not have been entered in the first instance.

B. The January 2016 Sanction Order

Although Magistrate Judge VanDervort was aware of the parties' settlement, the District Court Judge was not aware of the settlement and issued a *Memorandum Opinion and Order* granting James River's *Second Motion for Contempt* on January 5, 2016. [JA 492-501]. The Court also fined Justice Energy \$30,000 per day until such time as it fully complied with the Court's *Order* of May 22, 2015. [*Id.*]. Notably, the District Court directed the Clerk to send copies of the Order to counsel

of record and to any unrepresented party. [JA 501]. However, the record does *not* indicate that the Clerk attempted to forward the Order to Justice Energy.¹

On January 25, 2016, the Court issued an *Order* requiring the parties to submit to the Court written statements on whether Justice Energy had complied with the May 22, 2015 Order. [JA 502]. Again, the District Court directed the Clerk to send copies of the Order to counsel of record and to any unrepresented party. [*Id.*]. However, the record does *not* indicate that the Clerk attempted to forward the *Order* to Justice Energy.

On February 1, 2016, the Court received *Plaintiff James River Equipment, Virginia, LLC's Written Statement Regarding Whether the Defendant Has Fully and Faithfully Complied with the Terms of the May 22, 2015 Order*, wherein James River informed the District Court for the first time of the settlement with Justice Energy, but indicated that Justice Energy had not tendered the January payment as scheduled. [JA 503-508].

C. Justice Energy's Actions Upon Learning of the January 2016 Sanction Order.

The officers and directors of Justice Energy were completely unaware of the January 2016 Sanction Order until February 15, 2016, when David Gutman of the Charleston Gazette-Mail e-mailed Grant Herring, a representative of the Justice for

¹ Counsel for James River e-mailed a copy of the January 2016 Sanction Order to Roman Semenov on January 6, 2016. [JA 508].

Governor campaign, requesting a comment on the January 2016 Sanction Order. [JA 539]. This e-mail ignited an internal investigation and the officers and directors of Justice Energy finally learned of the contents of the January 2016 Sanction Order and the \$30,000 per day fine. [JA 538 at ¶ 25]. Immediately upon learning of the January Sanction Order, Justice Energy tendered settlement payments to James River and, in conjunction, James River filed a *Joint Motion to Stay Action*. [JA 537-538 at ¶¶ 24, 26; JA 510 at ¶ 8].

The *Joint Motion to Stay Action* indicated that (a) the parties had agreed to a settlement which required six (6) consecutive monthly payments and (b) Justice Energy had made four payments, including the two payments tendered earlier that day, and (c) the final two payments were due on March 1, 2016 and April 1, 2016, respectively. [JA 509-510].

In addition, Justice Energy secured counsel to appear in this matter to ensure clear communication between the parties and with the District Court. [JA 512-513]. On February 19, 2016, Justice Energy's counsel filed a written statement in response to the District Court's January 25, 2016, Order. [JA 514-516]. This report reflected, among other things, that the May 22, 2015, Order had been resolved or rendered moot by the settlement agreement and that the attorneys' fees awarded to James River were being paid pursuant to the settlement agreement. [JA 514].

D. The District Court's Multiple Sanction Orders Issued On February 25, 2016

Significantly, the District Court issued three separate orders on February 25, 2016, all addressing the sanction issue. The first order (the “First February 25 Sanction Order”) recognized that Justice Energy was now in compliance with the May 22, 2015 Order; that the parties had settled the dispute; and that the parties wished to have the action stayed pending the final two settlement payments. [JA 517-518]. The First February 25 Sanction Order also stayed all claims and judgments against Justice Energy including the \$30,000 per day fine for civil contempt under the January 5, 2016 Order pending Justice Energy’s compliance with the payment plan. [JA 518].

Later that day, without any additional pleadings filed by either party, the District Court issued two more orders (the “Second February 25 Sanction Order” and the “Third February 25 Sanction Order”). The Second February 25 Sanction Order vacated and set aside the First February 25 Sanction Order [JA 519], while the Third February 25 Sanction Order mirrored the first with one exception – the District Court entered judgment against Justice Energy in the amount of One Million Two Hundred Thirty Thousand Dollars (\$1,230,000) payable to the United States as a sanction for its noncompliance with the May 22, 2015, Order from January 5, 2016, through February 14, 2016. [JA 502-521].

E. The District Court's Denial of Justice Energy's Motion to Alter to Amend Sanction Judgment.

Justice Energy filed its *Motion to Alter or Amend* pursuant to Rule 59(e) of the Federal Rules of Civil Procedure on March 23, 2016. [JA 527-575; JA 576-592]. Justice Energy appended several affidavits to the *Motion to Alter or Amend* in order to document the uncontroverted fact that Justice Energy's officers and directors were unaware of various orders and Court proceedings until the Gutman E-Mail arrived on February 15, 2016. [JA 531-537]. Upon receipt of the e-mail, the management of Justice Energy took immediate steps to come into compliance with the January, 2016, Sanction Order. [JA 538 at ¶ 26]. In addition, Justice Energy launched an internal investigation into Mr. Semenov's activities. [*Id.* at ¶ 25]. It became clear to the officers and directors of Justice Energy that Mr. Semenov *failed* to fully inform them of key orders issued by the Court in this matter, *failed* to respond appropriately to court orders and subpoenas, *failed* to attend court proceedings as directed by the Court, *failed* to respond to communications from Plaintiff's counsel, *failed* to update the West Virginia Secretary of State of the corporation's new address for service of process after the office at 100 Cranberry Creek Drive was closed, and *failed* to otherwise respect the District Court, James River, and others in this matter. [JA 531-538].

Specifically, the officers and directors discovered that Mr. Semenov did not advise them of the May 22, 2015, Order and the obligation to produce certain

documents. [JA 531-532 at ¶¶ 3-6; JA 533 at ¶¶ 3-6; JA 537 at ¶¶ 16-19]. However, upon receipt of the *Second Motion for Contempt* – a motion that sought *his* imprisonment as a sanction for various violations of the Court’s Orders – Mr. Semenov sought approval of a settlement agreement and payment plan. [JA 387; JA 543]. The officers and directors authorized a payment plan to settle the underlying dispute with James River Equipment – a debt that was incurred while Justice Energy was owned and operated by Mechel Bluestone. [JA 543]. The parties entered into a settlement and payment plan on October 15, 2015. [JA 544]. Notwithstanding these mitigating factors, the District Court denied the *Motion to Alter or Amend*.

With the exception of Mr. Hammond’s e-mail of January 6, 2016, in which he forwarded the January 2016 Sanction Order to Mr. Semenov, the internal investigation did not reveal any record that Justice Energy received a copy of the January 2016 Sanction Order. [JA 508; JA 554 at ¶ 13]. The internal investigation also revealed that Mr. Semenov did not forward the e-mail to anyone else within Justice Energy or Bluestone Industries and that he did not save the January 2016 Sanction Order on the company server. [*Id.* at ¶¶ 10 and 11].

As set forth above, this case began in 2013 while Justice Energy was owned and operated by Mechel Bluestone, a wholly-owned subsidiary of Mechel OAO, a publicly-traded Russian company. [JA 535 at ¶ 2]. At that time, Mechel Bluestone maintained an office at 100 Cranberry Creek Drive in Beckley, West Virginia. [JA

536 at ¶ 5]. Mr. Semenov served as General Counsel of Mechel Bluestone and worked out of the Cranberry Creek Drive office. [*Id.* at ¶¶ 4 and 6]. He was also the registered agent for service of process for a number of Bluestone entities, including Justice Energy, and his address was listed with the West Virginia Secretary of State's office as 100 Cranberry Creek Drive, Beckley, West Virginia. [*Id.* at ¶ 7]. Mr. Semenov ceased employment with Justice Energy and its affiliated entities on February 29, 2016. [*Id.* at ¶ 27].

IV. SUMMARY OF LEGAL ARGUMENT

First, the sanction, which was more than eight (8) times the amount of money at stake in the underlying lawsuit, was not proportionate to the offending conduct, but rather was excessive. Accordingly, the sanction judgment should be vacated and remanded.

Second, the sanctions were premised upon an incomplete factual record and, when considered in light of the supplemental facts set forth in Justice Energy's *Motion to Alter or Amend*, the result was manifestly unjust. The District Court's refusal to consider the supplemental facts as mitigating factors constitutes an abuse of discretion under these circumstances. As such, the sanction judgment should be vacated and remanded.

V. STANDARD OF REVIEW

The District Court's contempt ruling is subject to an abuse of discretion standard of review. *Ashcroft v. Conoco, Inc.*, 218 F.3d 288, 301 (4th Cir. 2000)(discussing civil contempt findings under 18 U.S.C. § 401 and stating "[w]e review the district court's civil contempt order for abuse of discretion.")(internal citations omitted); *In re Under Seal*, 749 F.3d 276, 285 (4th Cir. 2014)(discussing the standard of review of a civil contempt penalty for violating a court's Pen/Trap order). Likewise, the District Court's denial of the *Motion to Alter or Amend* is subject to an abuse of discretion standard of review. *Ingle ex rel. Estate of Ingle v. Yelton*, 439 F.3d 191, 197(4th Cir. 2006)(holding the Fourth Circuit reviews the denial of a Rule 59(e) motion under the abuse of discretion standard)(internal citations omitted).

VI. LEGAL ARGUMENT

A. **The District Court Abused its Discretion by Issuing a Sanction that is Not Reasonably Proportionate to the Offending Conduct, but Rather is Excessive.**

In its January 2016 Sanction Order, the District Court sanctioned Justice Energy in the amount of \$30,000 per day until such time as it complied with the Court's May 22, 2015, Order. [JA 501]. On February 25, 2016, in its Third Order, the District Court entered judgment against Justice Energy in the amount of \$1,230,000.00 in favor of the United States. Justice Energy filed a *Motion to Alter*

or Amend in which it argued, among other things, that the \$1,230,000.00 sanction was excessive and disproportionate to the underlying conduct. [JA 527-593].

In ruling on Justice Energy’s *Motion to Alter or Amend*, the District Court held that “Fourth Circuit precedent does not require this Court to calculate a sanction which is ‘proportionate to the perceived conduct of a party’”. [JA 604]. Nonetheless, in conclusory fashion, the District Court stated that the sanction was proportionate to the offending conduct. [JA 604-605]. Although sanction proportionality has not been addressed by the Fourth Circuit, both the First and Seventh Circuits have considered and adopted proportionality to conduct in evaluating appropriateness of sanctions. *See, e.g., Newman v. Metropolitan Pier & Exposition Authority*, 962 F.2d 589, 591 (7th Cir. 1992)(discussing the sanction of dismissal under Rule 37 resulting from a failure to comply with discovery orders involving attendance at a deposition); *Goya Foods, Inc. v. Wallack Mgmt. Co.*, 344 F.3d 16, 19-20 (1st Cir. 2003)(recognizing proportionality is an appropriate factor to consider in determining the amount of sanctions under the Court’s inherent powers). The United States District Court for the Northern District of West Virginia has also recognized proportionality as a factor in assessing monetary sanctions. *Bradley v Sunbeam Corp.*, 2003 U.S. Dist. LEXIS 14451 (N. D. W. Va. 2003).²

² This Court’s decision in *Bradley v. American Household, Inc.*, 378 F.3d 373 (4th Cir. 2004) ultimately vacated and remanded this decision. However, this Court’s holding was premised upon the criminal nature of the sanction. *Id.* As such, the issue of proportionality was not explicitly addressed by this Court in *Bradley*.

In *Bradley*, the District Court considered sanctions for the spoliation of evidence and failure to supplement discovery and produce documents under the Court's inherent powers and Rule 37. The District Court stated that in determining the amount of a monetary sanction under Rule 37 and the Court's inherent power "the Court must be guided by the norm of proportionality that guides all judicial applications of sanctions." *Bradley v. Sunbeam Corp.*, 2003 U.S. Dist. LEXIS 14451, 51-52 (N. D. W. Va. 2003)(citing *Newman*, 962 F.2d at 591). Justice Energy respectfully submits that, to the extent the Fourth Circuit has not recognized the standard of proportionality, this is an appropriate case in which to do so.

Although "mathematical exactitude is not required," a sanction should be "reasonably proportionate to the offending conduct". *Goya Foods, Inc.*, 344 F.3d at 19-20 (citing *United States v. United Mine Workers*, 330 U.S. 258, 303, 67 S. Ct. 677, 91 L. Ed. 884 (1947); *Long v. Steepro*, 213 F.3d 983, 986 (7th Cir. 2000); *Navarro-Ayala v. Nunez*, 968 F.2d 1421, 1426-27 (1st Cir. 1992)). "[T]rial courts do not have unbridled license to pluck dollar figures out of thin air and incorporate them in[to] sanctions." *Id.* (citing *Roadway Exp., Inc. v. Piper*, 447 U.S. 752, 764-65, 100 S. Ct. 2455, 65 L.Ed.2d 488(1980); *Navarro-Ayala*, 968 F.2d at 1426-27). Rather, trial courts "should take pains neither to use an elephant gun to slay a mouse nor to wield a cardboard sword if a dragon looms." *Anderson v. Beatrice Foods*,

Inc., 900 F.2d 388, 395(1st Cir. 1990) (discussing sanctions awarded under Fed. R. Civ. P. 11 and 37).

Although the District Court was rightfully frustrated with Justice Energy's apparent lack of responsiveness in this matter,³ it did not attempt to demonstrate the manner in which it determined the amount of the fine, or how the \$30,000 per day fine was proportionate to the perceived conduct of Justice Energy. Rather, the Court referenced the litany of events leading up to its January 2016 Sanction Order and its conclusion that "only a significant monetary sanction was likely to coerce the Defendant into compliance". [JA 604 at fn. 3].

Although Justice Energy recognizes that District Court's findings are entitled to deference, in this case the District Court did not delineate how the sanction was proportionate to the perceived conduct of Justice Energy, the new evidence presented by Justice Energy's *Motion to Alter or Amend*, or the underlying settlement with James River that had been in effect for over two (2) months before the January 2016 Sanction Order was entered. Simply put, the District Court provided no rationale as to how the \$30,000 per day fine was calculated, but rather recited the procedural history of the civil action and why it believed a monetary fine was appropriate. [JA 603-604]. Absent some explanation as to the factual basis for

³ As noted above, Mr. Semenov failed to inform the officers and directors of Justice Energy of key orders and developments in this matter. Thus, the officers and directors of Justice Energy did not have an opportunity to respond appropriately to the Court's Orders.

the \$30,000 per day sanction, Justice Energy submits that this Court should conclude that the District Court arbitrarily arrived at this figure without any reference to the damages at stake in the underlying proceeding or the harm, if any, suffered by the parties. As such, Justice Energy respectfully submits that the fine in comparison to the underlying settlement amount and conduct was disproportionate and an abuse of discretion. Moreover, by any objective standard, a fine of \$30,000 per day, totaling \$1,230,000.00, in a matter involving \$148,496.14 is not proportionate, constitutes an abuse of discretion, and should be vacated and remanded to the District Court.

B. The Court Abused its Discretion by Failing to Consider New Evidence Regarding Justice Energy's Lack of Knowledge of Both the May 22, 2015, Order and the January 5, 2016, Sanction Order.

The District Court's denial of Justice Energy's *Motion to Alter or Amend* was an abuse of discretion given the new evidence presented as to the officers' and directors' lack of actual knowledge of key rulings. *See Ingle ex rel. Estate of Ingle v. Yelton*, 439 F.3d 191, 197(4th Cir. 2006)(holding the Fourth Circuit reviews the denial of a Rule 59(e) motion under the abuse of discretion standard)(internal citations omitted). The District Court found that the mere negligence of the employee, Justice Energy's General Counsel, was insufficient to give rise to manifest injustice under Rule 59(e). [JA 599-600]. At a minimum, the new evidence regarding this lack of knowledge should have been considered a mitigating factor in

evaluating the amount of the sanction and the District Court's failure to do so was an abuse of discretion.

Justice Energy set out in great detail that its officers and directors did not know of either the May 22, 2015 Order or the January 2016 Sanction Order until February 15, 2016, when a reporter sent an e-mail requesting comment. Mr. Semenov did not advise the officers and directors of Justice Energy of either the May 22nd or the January 2016 Sanction Order. [J.A. 532 at ¶¶ 7-9; J.A. 534 at ¶¶ 7-9; J.A. 537 at ¶¶ 20-22]. Thus, Justice Energy and its officers and directors were effectively denied an opportunity to act promptly and minimize the monetary sanction.

Knowledge of the underlying court orders is a necessary component of a civil sanction. *Ashcroft*, 218 F.3d at 301 (4th Cir. 2000)(quoting *Colonial Williamsburg Found. v. The Kittinger Co.*, 792 F.Supp. 1397, 1405-06 (E.D. Va. 1992), *aff'd*, 38 F.3d 133, 136 (4th Cir. 1994) establishing four elements for courts to assess when a party moves for civil contempt sanctions including, *inter alia*, knowledge or constructive knowledge of a valid decree and that its conduct violated the terms of that decree); *McAirlaids, Inc. v Medline Industries Inc.*, 2016 U.S. Dist. LEXIS 139719, *3-4 (W. D. Va. 2016)(finding without establishing a knowing violation of a preliminary injunction order and resultant harm by clear and convincing evidence, the claim for civil contempt fails).

The District Court made no finding that the officers and directors of Justice Energy had *actual* knowledge of these Orders and knowingly failed to comply. *See generally* [JA 593-605]. To the contrary, the uncontradicted evidence reflected that the officers and directors of Justice Energy did *not* have actual knowledge of the orders and that Justice Energy acted promptly to come into compliance when its officers and directors learned of the orders.

In denying Justice Energy's *Motion to Alter or Amend*, the District Court simply dismissed this evidence as irrelevant because the "...negligence of an employee is insufficient to give rise to 'manifest injustice' under Rule 59(e)." [JA 599]. Similarly, the District Court was unpersuaded by the immediate corrective steps that Justice Energy took to comply with the various Court orders after its officers and directors learned of the January 2016 Sanction Order. [JA 600 at fn. 2]. Finally, the District Court ignored the fact that the May 22, 2015 Sanction had been resolved through the October 15, 2015, settlement, long before Court issued the \$30,000 per day fine on January 5, 2016.

The January 2016 Sanction Order provided that Justice Energy was "in civil contempt and fined the sum of thirty thousand dollars (\$30,000) per day beginning on January 5, 2016 and continuing until such time as the Defendant fully complie(d) with the terms of the Court's Order of May 22, 2015." (J.A. 501). In turn, the May 22nd Order directed Justice Energy to produce documents reflecting the assumption

of debt and liability, if any, from a recent transaction with Mechel North America, Mechel Bluestone, Inc. and/or Mechel North America Sales Corporation within fourteen (14) days. (J.A. 317).

However, the October 15, 2015, settlement agreement acknowledged that Justice Energy would be responsible for the underlying debt incurred while it was owned by Mechel Bluestone. [JA 535 at ¶ 3]. The settlement agreement obviated the need for Justice Energy to produce documents required under the May 22 Order regarding the assumption of debt and liability that was incurred while the company was owned by Mechel Bluestone. [JA 514].

The District Court found the uncontradicted facts regarding Justice Energy's lack of actual knowledge irrelevant and refused to amend or modify the sanction in any respect. The District Court emphasized that Justice Energy is a "sophisticated business entity" and that the "mere negligence of Mr. Semenov was insufficient to give rise to the 'manifest injustice' standard under Rule 59 (e)." [JA 599]. With respect to Justice Energy's argument that the May 2015 Order had been satisfied by the October 15, 2015 settlement agreement, the Court observed that the "Court is not clairvoyant". [JA 601]. However, the Court fails to mention that the James River's counsel had advised Magistrate VanDervort of the settlement. [JA 544].

Actual knowledge of the underlying orders or violation of the same by the offending party should be considered pertinent to the degree of sanctions. *See*

Mcairlaids, Inc., 2016 U.S. Dist. LEXIS at *3-4 (finding that knowledge of violation of a court order is a required element of civil contempt); *Weisman, et al. v. Alleco, Inc., et al.*, 925 F.2d 77, 80 (4th Cir. 1991) (per curiam) (discussing sanctions under Rule 11 and finding that the objective standard determines if an offense occurs, but subjective standards regarding the same factors may be mitigating factors in determining the appropriate sanction). The District Court's unwillingness to consider the actual knowledge of Justice Energy's officers and directors in evaluating the amount of the sanction constitutes an abuse of discretion in this case. *See Anderson*, 900 F.2d at 394 (evaluating sanctions arising under Fed. R. Civ. P. 11 and 37 and stating that an abuse of discretion occurs, *inter alia*, when "...a material factor deserving significant weight is ignored.").

This case is analogous to *Jewell v. Actavis Group*, 2010 U.S. Dist. LEXIS 77043, *2 (S.D. W. Va. 2010) in which United States District Judge Goodwin dismissed an action with prejudice as a discovery sanction. In response to Plaintiff's motion to alter or amend the judgment, Judge Goodwin noted that the Court had limited information regarding the plaintiff's actual role in the circumstances giving rise to the dismissal. *Id.* at *2-3. Therefore, the Court provided the plaintiff with an opportunity to advise the court *via* letter of any grounds he wished to raise in support of amending the judgment "in order to prevent . . . manifest injustice in the event the plaintiff, as opposed to his counsel, was blameless for failure to provide

sufficient [discovery] responses. . . .” *Id* at *3. Ultimately, Judge Goodwin granted the motion and vacated that portion of the underlying order dismissing the action with prejudice in order to prevent manifest injustice. *Id* at *6.

Unlike Judge Goodwin, the District Court in this case failed to recognize mitigating factors such as (1) the settlement agreement entered into by the parties over two (2) months before the January 2016 Sanction Order was entered, (2) the actual knowledge or, more accurately, the lack thereof of key directors and officers of Justice Energy of the underlying orders, and (3) the quick action taken to remedy the situation once those officers and directors learned of the underlying orders. The District Court’s denial of the *Motion to Alter or Amend* under these circumstances constitutes an abuse of discretion.

VII. CONCLUSION

For the foregoing reasons, Justice Energy Company, Inc. prays that this Court will enter an Order reversing and vacating the lower court’s imposition of the fine in the amount of \$1,230, 000 in favor of the United States of America.

VIII. REQUEST FOR ORAL ARGUMENT

Pursuant to Local Rule 34(a), Appellant Justice Energy Company, Inc. respectfully requests that this Court grant it oral argument on the issues presented by this appeal.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned counsel certifies that the Brief of Defendant-Appellant, Justice Energy Company, Inc., complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and the typeface requirements of Fed. R. App. P. 32(a)(5) because:

1. Excluding the exempted portions in Fed. R. App. P. 32(a)(7)(B)(i), this brief contains Six Thousand Five Hundred and Twenty-Two (6,522) words as calculated by the word count feature of Microsoft Word 2013.
2. This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013, using Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of May, 2018, I electronically filed the foregoing Corrected Brief of Appellant with the Court using the Court's CM/ECF system which will automatically generate and send by e-mail a Notice of Docket Activity to all registered attorneys participating.

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